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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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GARY IOPOLO,

Plaintiff and Respondent,

v.

CHARLEY SMITH,

Defendant and Appellant.

C060286

(Super. Ct. No.  
SCV20656)

Plaintiff Gary Ioppolo entered into an agreement with defendant Charley Smith to purchase 30 acres of unimproved land for \$300,000. The transaction hit a snag when Ioppolo learned Smith's 30-acre parcel had not been legally separated from Smith's larger 56.5-acre parcel. Smith agreed to transfer the entire parcel to Ioppolo, with the understanding that Smith had two years to obtain a lot split from Placer County that would legally divide the 30 acres from the larger 56.5-acre parcel. Once Smith obtained the lot split, Ioppolo would reconvey the 26.5-acre parcel to Smith.

Five years and some litigation later, Smith failed to obtain the lot split legally dividing the parcel. Ioppolo filed suit to confirm he owned the entire 56.5-acre parcel. Following a court trial, the trial court transferred the entire parcel to Ioppolo. Smith appeals, arguing the trial court's action amounts to forfeiture and constitutes an abuse of discretion. We shall affirm the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### ***The Transaction***

Smith owned a single piece of unimproved property in Placer County consisting of 56.5 acres. At one time, the acreage was two separate parcels. In 1996 Smith completed a lot line adjustment that consolidated the two parcels into one. Despite having two parcel numbers, the property is currently one parcel.

In 2002 Smith listed 30 acres of the property for sale. In May 2002 Ioppolo and Smith entered into a "Vacant Land Purchase Agreement and Joint Escrow Instructions," under which Smith agreed to sell to Ioppolo a 30-acre parcel. The timing of the close of escrow was important since Ioppolo was acquiring the parcel as part of a "1031 exchange" with a December 2002 deadline to complete the exchange.<sup>1</sup>

Shortly before the scheduled close of escrow, Ioppolo learned the 30-acre parcel was part of the larger, undivided 56.5-acre parcel. Placer Title Company advised that the 30-acre

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<sup>1</sup> The purchase was made as an exchange pursuant to Internal Revenue Code section 1031 (26 U.S.C.A. § 1031).

parcel was not a legal parcel. Smith could not convey legal title to the 30-acre parcel because it had not been legally divided from the master parcel. In an attempt to resolve the situation, Smith and Ioppolo entered into "Addendum No. 5" to the purchase agreement, which stated, in part: "Escrow to be extended 30 days. Additional days will be added if necessary to accommodate . . . [Smith's] ability to split the 30 acres from the 57 acres."

Addendum No. 5 was designed to give Smith time to obtain county approval to subdivide the property into two smaller legal parcels: a 30-acre parcel to be sold to Ioppolo and a 26.5-acre parcel to be retained by Smith. However, Smith testified he did nothing during this period to divide the property.

In the fall of 2002 Ioppolo needed to close escrow to complete his 1031 exchange. Smith still had not brought the 30-acre parcel into compliance with the Subdivision Map Act. (Gov. Code, § 66410 et seq.)

In an effort to salvage the sale, on October 6, 2002, Smith and Ioppolo entered into "Addendum No. 6," under which Smith was to transfer all 56.5 acres to Ioppolo. In essence, the parties devised a process so that escrow could close. Pursuant to the addendum, the parties entered into a separate agreement on December 5, 2002.

This agreement, the "Addendum to Real Estate Purchase & Sale Agreement" (December 2002 Addendum), stated that since Smith had not divided the 56.5-acre parcel, he could not transfer the 30-acre parcel to Ioppolo under the original

agreement. Therefore, the parties agreed that Smith would transfer the 56.5 acres to Ioppolo and continue his efforts to formally divide the parcel. Once Smith successfully subdivided the parcel, Ioppolo would convey the 26.5-acre parcel back to Smith and retain the 30-acre parcel. Smith would not condition his performance on obtaining any encumbrances or restrictions on Ioppolo's 30-acre parcel, such as an access easement. If Smith failed in his efforts to subdivide the parcel by December 31, 2004, Ioppolo would be entitled to retain the entire 56.5-acre parcel.<sup>2</sup> The December 31, 2004, deadline could be extended for one year on a showing by Smith that he had made a good faith effort to divide the property but had been prevented from doing so by events beyond his control. However, in the absence of county approval of the land division, the parties agreed Ioppolo would retain ownership of the entire 56.5-acre parcel.

### ***Litigation Begins***

Smith attempted to sell the 26.5 acres to adjoining landowners. In 2003 Smith entered into agreements with two neighbors to sell them portions of the 26.5 acres.

Smith met with Ioppolo and his wife, Rosanne Ioppolo, and asked them to sign the purchase agreements and applications for lot line adjustments needed to close the sales to adjoining landowners. The Ioppolos informed Smith they wanted to have

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<sup>2</sup> Ioppolo's real estate agent testified she consulted with the county employees in charge of lot splits and learned it could take up to two years at a cost of \$30,000 to \$40,000.

their attorney look over the documents prior to signing them. The Ioppolos never signed the documents, but instead requested that Smith comply with the December 2002 Addendum and apply to the county for a lot split.

On December 31, 2003, Smith filed suit against Ioppolo, alleging Ioppolo had failed to cooperate in effecting the division of the 56.5-acre parcel. Ioppolo filed a cross-complaint alleging Smith had breached the agreement.

This lawsuit settled and the court entered a "Stipulation for Clerk's Deed of Partition and Dismissal; Order." Under the terms of the stipulation, the parties agreed to dismiss the suit, to reaffirm the original agreement and the December 2002 Addendum, that a clerk's deed for the 26.5-acre parcel would be issued to Smith to give him equitable title, to provide a six-month extension for Smith to subdivide the parcel, and that Smith would have no claim for any easement or right of use over the Ioppolos' 30-acre parcel.

The parties entered into the stipulation on April 7, 2005. Under the terms of the stipulation, Smith had until October 7, 2005, to complete formal division of the 56.5-acre parcel. Smith failed to meet this deadline.

### ***The Current Litigation***

Ioppolo filed a complaint for breach of contract, specific performance, and declaratory relief in February 2007. Smith filed a cross-complaint seeking declaratory relief and seeking to establish an implied easement or easement of necessity across the property. The trial court sustained Ioppolo's demurrer and

granted Smith leave to amend. Smith never filed an amended cross-complaint.

A court trial followed. In addition to information surrounding the agreement and addendums, the evidence established that Smith never submitted an application to the county for a lot split. Smith failed to establish a right of access to the part of the parcel he was to retain, a prerequisite for a lot split. Smith knew of the requirements for a lot split when he entered into the December 2002 Addendum.

In addition, Smith held a real estate license for a number of years and worked for several real estate firms. Over the years, Smith purchased 50 parcels of land and applied for and received four lot line adjustments. Smith also applied for and obtained lot splits.

The trial court found Smith breached his contract with Ioppolo by failing to obtain a formal division of the property. The court noted: "The fact of the matter is that defendant failed to submit an application to Placer County for either a minor land division or parcel map, in order to comply with the requirements of the Subdivision Map Act. Defendant availed himself of the sale proceeds and then engaged in post-hac [sic] rationalizations and excuses in attempting to justify his breaches. Defendant, himself knowledgeable in real estate transactions and represented by a real estate agent and attorney here, was fully advised of the risks attendant to his failure to convey a 'formally divided,' legal, 'separately-saleable' parcel to plaintiffs."

The court also considered whether granting Ioppolo specific performance amounted to an impermissible forfeiture: "The only unfairness that may result is if defendant is permitted to keep hundreds of thousands of dollars in sale proceeds without having conveyed to plaintiffs a legal parcel that complies with applicable Subdivision Map Act requirements. . . . [D]efendant has had the benefit of the sales proceeds for a substantial period of time, while plaintiffs have yet to receive what they bargained for. Accordingly, in the exercise of its broad equitable powers, it is appropriate for the court to balance the equities by requiring defendant to specifically perform the agreement and to declare plaintiffs' right to have defendant convey his interest in the 26.5-parcel [sic] to them."

The court ordered Smith to transfer the 26.5 acres to Ioppolo by September 8, 2008. Smith failed to comply and Ioppolo filed an order to show cause seeking to enforce the judgment. The court ordered a clerk's deed executed transferring the 26.5 acres to Ioppolo. Smith filed a timely notice of appeal.

## **DISCUSSION**

### **I.**

Smith does not dispute the court's finding that he breached his agreement with Ioppolo. Instead, Smith challenges the court's decision to award Ioppolo the entire 56.5-acre parcel as a remedy for breach of contract. Smith contends the court's decision to order specific performance of the agreement amounts

to a forfeiture and faults the court for not ordering a less draconian remedy for the breach.

We review a judgment granting specific performance under the abuse of discretion standard and determine whether the trial court's grant of specific performance exceeded the bounds of reason. (*Petersen v. Hartell* (1985) 40 Cal.3d 102, 110.) To obtain specific performance for a breach of contract, a plaintiff must show the consideration was adequate, the contract just and reasonable, and that the plaintiff has no other remedy at law. (*Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal.App.3d 571, 575.) Whether a contract is fair and reasonable is determined from the circumstances as they existed at the time the contract was made. (*Hall v. Hall* (1990) 222 Cal.App.3d 578, 588.) A subsequent change in circumstance that makes the performance more difficult or expensive is not a bar to specific performance. (*Ellison v. Ventura Port District* (1978) 80 Cal.App.3d 574, 582.)

Specific performance cannot be enforced against a party in any of the following cases: (1) if the party has not received adequate consideration; (2) if the contract was not just and reasonable; (3) if the party's assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract; or (4) if the party's assent was given under the influence of mistake, misapprehension, or surprise, except where the contract provides for compensation in case of mistake. (Civ. Code, § 3391.)



Smith agreed to accept \$300,000 from Ioppolo for the 30-acre parcel. However, to convey the purchased parcel, Smith had to obtain a lot split to sever the remaining 26.5 acres. Smith then entered into the December 2002 Addendum, under which he had two years to obtain the lot split or lose the additional 26.5 acres. In effect, Smith accepted \$300,000 for all 56.5 acres if he was unable to bring the parcel into compliance with the Subdivision Map Act. Without the lot split, Smith did not have a separately saleable 30 acres to transfer to Ioppolo. All of this was known to both Smith and Ioppolo when they entered into the December 2002 Addendum.

As the court noted, Smith failed to submit an application with the county in order to comply with the Subdivision Map Act. However, Smith accepted the \$300,000 purchase price and enjoyed use of the money while doing nothing to live up to his end of the bargain. Smith, experienced in real estate and represented by a real estate agent and counsel, knew the risks of a failure to convey a separately saleable 30-acre parcel to Ioppolo. With this knowledge, Smith freely entered into the December 2002 Addendum under which he risked losing the 26.5 acres if he failed to comply with the agreement.

Under these circumstances, the trial court did not abuse its discretion in granting Ioppolo specific performance. Smith, fully cognizant of the risk, signed the December 2002 Addendum, which states: "In the event that Seller has failed to complete the division of the Subject Property [within the period allowed] . . . Purchaser shall be entitled to keep and retain

the entire 56.5 acres in fee simple without further compensation or reimbursement of any kind or nature whatsoever to Seller." Five years passed without Smith's living up to his end of the bargain. Specific performance is amply supported by these facts.

## **II.**

Smith contends the court's award of specific performance constituted an impermissible forfeiture. Civil Code section 3369 states: "Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or as otherwise provided by law."

Smith acknowledges he agreed to forfeit his 26.5-acre parcel in the event he failed to obtain a division of the 56.5-acre parcel into two legal parcels of 30 and 26.5 acres. Smith terms this agreement "a very bad bargain for Smith to have made." However, on appeal, Smith argues the trial court's order amounted to a forfeiture that bore no reasonable relationship to the damages caused by the breach.

We disagree. The trial court considered whether enforcing the agreement constituted an impermissible forfeiture and observed that Smith kept the \$300,000 in proceeds from the sale for a substantial period of time without having conveyed to Ioppolo a legal 30-acre parcel. In effect, for five years Smith had the use of Ioppolo's payment for the property but made no effort to deliver the property to the new owner.

Smith makes no mention of this fact, but instead argues the 26.5 acres was worth no less than \$265,000.<sup>3</sup> Therefore, Smith argues, he was not given adequate consideration and the court's order was a forfeiture "punitive in nature and clearly not just and reasonable."

To the contrary, the trial court spelled out the equities of the situation: Smith retained the \$300,000 purchase price but Ioppolo did not have beneficial use of the property for over five years. Given the facts before it, the court determined Smith's long-term failure to convey the purchased parcel to Ioppolo justified awarding the entire parcel to Ioppolo. The court's solution was not a forfeiture.

### **III.**

On appeal, Smith argues the trial court should have exercised its equitable powers and considered a lesser remedy. The court, Smith contends, should have decreed an easement over the Ioppolo parcel or ordered a rescission of the contract.

However, Smith fails to set forth any grounds for rescission, and the trial court found no breach on Ioppolo's part. As for the requested easement, Smith unequivocally disclaimed any right to an easement across Ioppolo's parcel in the stipulation and order that followed the initial litigation.

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<sup>3</sup> At trial Smith testified he believed the parcel was worth \$1,000,000. On appeal, Smith argues "it is a fair presumption that the 26.5 acre parcel was worth at least as much per acre as the 30 acre parcel sold to Ioppolo for \$10,000.00 per acre in 2002."

The stipulation states Smith "holds no claim, and will assert no claim, of any easement or right of use or access across . . . Ioppolo's adjoining property."

**DISPOSITION**

The judgment is affirmed. Ioppolo shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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RAYE, J.

We concur:

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SIMS, Acting P. J.

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HULL, J.